

**United States Department of Labor
Employees' Compensation Appeals Board**

F.N., Appellant

and

**DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE,
Oakland, CA, Employer**

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**Docket No. 18-1543
Issued: March 6, 2019**

Appearances:
*Stephanie N. Leet, Esq., for the appellant*¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On August 9, 2018 appellant, through counsel, filed a timely appeal from a June 29, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision dated March 30, 2011, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.³

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that, following the June 29, 2018 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUE

The issue is whether OWCP properly determined that appellant's request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On February 14, 2005 appellant, then a 49-year-old contact representative, filed an occupational disease claim (Form CA-2) alleging that she sustained cervical radiculopathy due to factors of her federal employment, which required that she perform work on the computer and telephone while sitting in one position for eight hours per day. She further explained that she performed her work while sitting in an uncomfortable chair that placed pressure on her back and neck. OWCP initially accepted the claim for cervical radiculopathy and paid appellant wage-loss compensation on the supplemental rolls commencing January 17, 2005, and on the periodic rolls commencing October 29, 2006.

By letter dated January 28, 2010, the employing establishment offered appellant a position as a part-time customer service representative for four hours per day. Appellant accepted the job offer on February 10, 2010.

In a progress report dated March 29, 2010, Dr. Douglas J. Abeles, Board-certified in orthopedic surgery, noted that appellant could return to modified desk work only, for four hours per day. On March 31, 2010 appellant returned to work for four hours per day. She was paid wage-loss compensation for the remaining four hours per day commencing that day.

In multiple claims for compensation (Form CA-7) dated from April 20 to June 4, 2010, appellant claimed that she was entitled to eight hours of wage-loss compensation on intermittent dates.

By development letter dated June 9, 2010, OWCP advised appellant of the deficiencies in the medical evidence submitted in support of her claim for wage-loss compensation and afforded her 30 days to provide additional medical evidence.

In response to the development letter, OWCP continued to receive medical reports from Dr. Abeles. In a report dated August 2, 2010, Dr. Abeles noted that appellant had developed right hand and thumb tendinitis and possible joint basilar joint arthritis which he attributed to her 2005 employment injury. In a report dated September 1, 2010, he placed appellant off work for three weeks due to increased pain in her neck and right hand.

By decision dated September 27, 2010, OWCP denied appellant's claims for a recurrence of disability, commencing April 20 to June 4, 2010, and continuing because the evidence of record was insufficient to support that she had an increase in disability which prevented her from being able to work 20 hours per week from April 20, 2010 forward as alleged. It noted that appellant would continue to be paid compensation for the four hours per day already being paid.

On November 18, 2010 OWCP referred appellant, along with a statement of accepted facts (SOAF), to Dr. Ramon Jimenez, Board-certified in general surgery, for a second opinion examination to determine her disability status. In a SOAF dated November 18, 2010, it indicated

that acceptance of appellant's claim had been expanded to include cervical spine stenosis and right shoulder impingement.

In his December 20, 2010 report, Dr. Jimenez diagnosed a cervical disc protrusion, acromial impingement syndrome bilaterally, brachial neuritis, and adhesive capsulitis of both shoulders. He indicated that her residuals post anterior cervical fusion persisted, and that appellant was unable to return to full-time work. Dr. Jimenez related that her condition was essentially permanent and stationary.

By letter dated and received February 14, 2011, appellant requested reconsideration of OWCP's September 27, 2010 decision.

On February 28, 2011 OWCP requested that Dr. Jimenez answer supplemental questions regarding his December 20, 2010 second opinion evaluation.

In a March 21, 2011 response, Dr. Jimenez noted that appellant's diagnoses were medically connected to her accepted employment injury. He indicated that the employment activities she engaged in caused her to have neck symptoms and signs compatible with the resultant diagnosis of cervical disc protrusion. Dr. Jimenez related that appellant's physical examination findings of limited range of motion in both shoulders, localized tenderness, and hypoesthesia in her left forearm and hand are all signs that referred to her cervical spine pathology and also to the shoulder acromial impingement syndrome and adhesive capsulitis.

By decision dated March 30, 2011, OWCP reviewed the merits of appellant's claim, but denied modification of the September 27, 2010 decision. It indicated that the evidence submitted in support of appellant's reconsideration request was insufficient to demonstrate that she was totally disabled from work for intermittent dates from April 20 to June 4, 2010 and continuously from August 30, 2010. OWCP noted that both Drs. Abeles and Jimenez discussed subjective findings as represented in the change of appellant's medical condition, but there was no change in objective findings that was put forward as part of a medical explanation of her reason for being totally disabled from work. It related that appellant's entitlement to wage-loss compensation for partial disability would continue uninterrupted.

In a report dated July 6, 2011, Dr. Abeles diagnosed degenerative disc disease of the cervical spine status post cervical fusion. He ordered appellant to remain off of work.

In a subsequent report dated October 3, 2011, Dr. Abeles noted limited range of motion, C5-6 radiculopathy bilaterally, and ordered a magnetic resonance imaging (MRI) scan. He instructed appellant to remain off work.

On December 5, 2011 OWCP referred appellant for a second opinion evaluation with Dr. Aubrey A. Swartz, a Board-certified in orthopedic surgeon. In a SOAF dated November 30, 2011, it related that acceptance of appellant's claim had been further expanded to include brachial neuritis, cervical disc protrusion, bilateral acromial impingement, and bilateral shoulder impingement. Dr. Swartz was asked to assess appellant's work-related condition including her current physical condition and her ability to return to work.

In a December 13, 2011 MRI scan report Dr. Abeles diagnosed a tear of the supraspinatus tendon, acromium with impingement, and arthropathy of the acromioclavicular joint.

In a report dated December 19, 2011, Dr. Abeles noted the progression of the right shoulder tear and the need for surgery. He also indicated that appellant had significant degenerative changes to her cervical spine.

In a second opinion evaluation report dated January 9, 2012, Dr. Swartz diagnosed aggravation of degenerative disc disease and aggravation of degenerative labral tears in both shoulders. He related that appellant's diagnoses were not related by direct cause, but would be by aggravation and probable permanent aggravation as a result of a preexisting degenerative disease and preexisting disc disease in the cervical spine. Dr. Swartz noted that both additional diagnoses were related to appellant's employment-related conditions, and indicated that she was capable of performing at least sedentary work.

In a report dated November 15, 2012, Dr. Abeles modified appellant's work restrictions. In a subsequent report dated January 23, 2013, he requested authorization for surgery to repair the torn rotator cuff in appellant's right shoulder. Appellant was ordered to remain off work. Dr. Abeles again requested authorization for surgery for the right shoulder on January 22, April 7, May 7, August 27, and October 29, 2014.

In response to a memorandum to a district medical consultant, Dr. Ellen Pichey, Board-certified in family practice and occupational medicine, opined on October 28, 2014 that it appeared reasonable to authorize appellant's right shoulder surgery.

Dr. Abeles continued to request authorization for appellant's right shoulder surgery in reports dated May 11, August 26, and September 21, 2015, and February 22, July 26, August 23, and September 27, 2016. He performed the procedure on December 7, 2016. Appellant remained off work.

On April 12, 2017 OWCP referred appellant for a second opinion evaluation with Dr. Mohinder Nijjar, Board-certified in orthopedic surgery. Dr. Nijjar was asked to provide an opinion as to the nature of appellant's condition, the extent of her disability, and appropriate treatment recommendations.

In a second opinion evaluation report dated May 16, 2017, Dr. Nijjar noted that appellant needed further treatment, including manipulation under anesthesia. Upon reviewing past diagnostic examinations, he diagnosed cervical radiculopathy, cervical spinal stenosis, brachial neuritis, cervical disc protrusion, bilateral acromial impingement, bilateral shoulder impingement, a right rotator cuff tear, and subacromial decompression and debridement of the shoulder joint. Dr. Nijjar also indicated that appellant had adhesive capsulitis in her right shoulder and radiating pain following her cervical surgery. He related that there had been no aggravation of a preexisting condition to produce her diagnoses. Dr. Nijjar noted that his objective findings included surgical scars, limited range of motion in the cervical spine, negative neurologic examination, and local tenderness in the right shoulder. He related that appellant was unable to return to regular work, but that she could return to work for four hours per day, with restrictions.

In a July 11, 2017 report, Dr. Abeles noted that appellant presented with a right shoulder still very limited in range of motion. He noted that his recommendation for manipulation of the shoulder under anesthesia had been denied. Dr. Abeles noted that there was no change in her total disability work status and that she was retired.

On October 27, 2017 appellant, through counsel, requested reconsideration of the March 30, 2011 decision.

By decision dated June 29, 2018, OWCP denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error. It noted that appellant's submission of a reconsideration request provided arguments substantially similar to arguments previously considered. With respect to the additional medical evidence submitted, OWCP concluded that the medical reports and the subsequently authorized surgery were not relevant to the issue of total disability in 2010 when appellant had made her claim for total disability.

LEGAL PRECEDENT

To be entitled to a merit review of an OWCP decision denying or terminating a benefit, an application for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁴ Timeliness is determined by the document receipt date (*i.e.*, the "received date" in OWCP's integrated Federal Employees' Compensation System.⁵ The Board has found that the imposition of the one-year time limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA.⁶

OWCP may not deny a reconsideration request solely because it was untimely filed. When a claimant's application for review is untimely filed, it must nevertheless undertake a limited review to determine whether it demonstrates clear evidence of error. If an application demonstrates clear evidence of error, OWCP will reopen the case for merit review.⁷

To demonstrate clear evidence of error, a claimant must submit evidence that is relevant to the issue that was decided by OWCP,⁸ is positive, precise, and explicit, and is manifest on its face that OWCP committed an error.⁹ The evidence must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must also shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision for which review is sought. Evidence that does not raise a substantial question is insufficient to demonstrate clear evidence of error. It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. A determination of whether the claimant has demonstrated clear evidence of error entails a limited review of how the evidence submitted with the reconsideration request bears on the evidence previously of record.¹⁰

⁴ 20 C.F.R. § 10.607(a).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (February 2016).

⁶ 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁷ *M.L.*, Docket No. 09-0956 (issued April 15, 2010). *See also* 20 C.F.R. § 10.607(b); *supra* note 5 at Chapter 2.1602.5 (February 2016) (the term clear evidence of error is intended to represent a difficult standard).

⁸ *See A.F.*, Docket No. 18-0645 (issued October 26, 2018); *Dean D. Beets*, 43 ECAB 1153 (1992).

⁹ *See A.F., id.*; *Leona N. Travis*, 43 ECAB 227 (1991).

¹⁰ *J.S.*, Docket No. 10-0385 (issued September 15, 2010); *B.W.*, Docket No. 10-0323 (issued September 2, 2010).

ANALYSIS

The Board finds that OWCP properly determined that appellant's request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.

OWCP's regulations¹¹ and procedures¹² establish a one-year time limitation for requesting reconsideration, which begins on the date of the original OWCP merit decision. A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.¹³ The most recent merit decision was OWCP's March 30, 2011 decision which found that the evidence of record was insufficient to establish that appellant was totally disabled for the period alleged. As her request for reconsideration was not received by OWCP until October 27, 2017, more than one year after the March 30, 2011 decision, it was untimely filed.¹⁴ Because appellant's request was untimely, she must demonstrate clear evidence of error on the part of OWCP in having denied total disability compensation for the period alleged.

OWCP denied the claimed period of total disability finding that the medical evidence then of record did not support that there had been a material worsening of appellant's medical condition that precluded her from performing specific job activities required by the January 28, 2010 job offer which she had accepted and for which she successfully worked four hours per day until April 20, 2010. It noted that the medical reports of Drs. Abeles and Jimenez discussed subjective findings, but did not identify an objective basis upon which total disability from work could be supported. OWCP determined that there was no other medical evidence of record relevant to the issue of total disability for the period claimed. Therefore, it determined that, while the evidence supported that appellant remained precluded from performing her date-of-injury job, or working in a full-time modified position, it did not support a finding of total disability.

In her request for reconsideration, counsel asserted that, following the March 30, 2011 decision, appellant had suffered a material change in the nature and extent of her accepted conditions, that she could no longer perform the 2010 job offer, and that she had not been provided with a formal loss of wage-earning capacity determination. She did not, however, argue that the medical evidence of record at the time of the last merit decision was sufficient to establish a claim for total disability. The Board thus finds that these arguments fail to demonstrate clear evidence of error on the part of OWCP in its March 30, 2011 decision as they are not relevant to the issue of whether appellant had met her burden of proof to establish, through the submission of medical evidence, total disability for claimed period.¹⁵

Appellant has also submitted new medical reports noting a progression of her disability. She submitted a series of medical reports from her attending physician, Dr. Abeles. In his reports,

¹¹ *J.W.*, Docket No. 18-0703 (issued November 14, 2018); 20 C.F.R. § 10.607(a); *see Alberta Dukes*, 56 ECAB 247 (2005).

¹² *Supra* note 5 at Chapter 2.1602.4 (February 2016); *see Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

¹³ *J.W.*, *supra* note 11; *Robert F. Stone*, 57 ECAB 292 (2005).

¹⁴ 20 C.F.R. § 10.607(b); *see Debra McDavid*, 57 ECAB 149 (2005).

¹⁵ *See S.M.*, Docket No. 16-0270 (issued April 26, 2016); *E.M.*, Docket No. 14-0667 (issued May 7, 2014); *Howard Y. Miyashiro*, 51 ECAB 253 (1999).

Dr. Abeles diagnosed additional conditions including degenerative disc disease of the cervical spine status post cervical fusion, a tear of the supraspinatus tendon, acromium with impingement, and arthropathy of the acromioclavicular joint; recommended right shoulder surgery; performed the right shoulder surgery on December 7, 2016; and restricted appellant from work. Likewise, in second opinion reports, Drs. Swartz and Nijjar diagnosed additional upper extremity conditions and recommended additional medical treatment, which was found to be reasonable by a district medical advisor.

The Board finds, however, that the new reports from Dr. Abeles and the second opinion physicians, Drs. Swartz and Nijjar, are irrelevant to the issue of whether appellant was totally disabled for the period claimed in the March 30, 2011 decision. None of the medical evidence submitted subsequent to the March 30, 2011 decision provides an opinion that appellant was totally disabled from work for the claimed period. Therefore, these reports fail to demonstrate clear evidence of error in OWCP's denial of appellant's disability claim.¹⁶

The Board finds that the evidence submitted in the untimely request for reconsideration does not raise a substantial question as to the correctness of OWCP's last merit decision and is therefore insufficient to demonstrate clear evidence of error. The underlying issue in appellant's claim is medical in nature with respect to the claimed period of total disability prior to the March 30, 2011 decision. The Board notes that the term clear evidence of error is intended to represent a difficult standard.¹⁷ Even a detailed, well-rationalized medical report, which would have created a conflict in medical opinion requiring further development if submitted prior to issuance of the denial decision, is insufficient to demonstrate clear evidence of error.¹⁸ It is not enough to show that evidence could be construed so as to produce a contrary conclusion. Instead, the evidence must shift the weight in appellant's favor.¹⁹

Accordingly, the Board finds that OWCP properly denied appellant's reconsideration request, as it was untimely filed and failed to demonstrate clear evidence of error.

CONCLUSION

The Board finds that OWCP properly determined that appellant's request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.

¹⁶ See *M.N.*, Docket No. 15-0758 (issued July 6, 2015).

¹⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5 (October 2011); see *Dean D. Beets*, *supra* note 8.

¹⁸ See *D.G.*, 59 ECAB 455 (2008); *L.L.*, Docket No. 13-1624 (issued December 5, 2013).

¹⁹ See *supra* note 16.

ORDER

IT IS HEREBY ORDERED THAT the June 29, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 6, 2019
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board